*of Selwyn*, 3 Hagg. Ecc. 748; *Johnson* v. *Merithew*, 80 Me. 111. Neither statement seems accurate, though the result reached is sound.

The Supreme Court of the United States has recently arrived at an opposite and original conclusion. A will devised the whole property of the testatrix to her only son, but "in the event of my becoming the survivor . . . of my son" then to a charitable Home. The mother and the son died in a shipwreck; and the property is claimed by the Home, the mother's next of kin, and the son's personal representative. The Court gave the property to the first on the ground that the will showed an intention that the Home should take if the son did not. *The Young, etc., Home* v. *French*, 23 Sup. Ct. Rep. 184. This is in reality interpreting the above words to mean that "unless my son survives the property shall go to the Home" — a dangerous twisting of the actual provisions of the will. It seems that here the mother's next of kin should have prevailed, as neither of the other claimants could prove the survivorship necessary to his case.

When the contest arises under an insurance policy, the same principles govern. He who has a *prima facie* right to the proceeds of the policy necessarily wins. The courts, however, differ as to who has this right. In Missouri if the insured cannot alter the policy the beneficiary's interest is considered as vested, and his representative prevails; if the policy can be altered, the representative of the insured wins. *U. S. Casualty Co.* v. *Kacer*, 69 S. W. Rep. 370; *Supreme Council* v. *Kacer*, *ibid.* 671. The real question should be not whether the policy is revocable or not, but whether the condition that the beneficiary should survive the insured is in form precedent or subsequent. If it is the former, his representative must bring forward evidence of actual survivorship; if the latter, he need not. In theory this distinction is evidently sound. The cases are in conflict. *Fuller* v. *Linzee*, 135 Mass. 468; *Cowman* v. *Rogers*, 73 Md. 403.

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# RECENT CASES.

AGENCY — RECOVERY OF PAYMENT INDUCED BY FRAUD OF AGENT — C. O. D. COLLECTION. — While goods consigned to the plaintiff C. O. D. were in the custom house, the defendant company collected the charges, knowing that the goods were so damaged that, had the plaintiff known their condition, he would not have made the payment. Before demand by the plaintiff, the money had been paid to the consignor. *Held*, that the defendant is liable for money had and received. *Hardy* v. *American Exp. Co.*, 65 N. E. Rep. 375 (Mass.).

The case brings out clearly the true nature of the undertaking of a carrier to deliver goods consigned C. O. D. Being no part of his duty as a carrier, it is the result of a special contract, express or implied, by which he becomes the agent of the consignor for the collection of his charges. *Cox* v. *Columbus & W. R. R. Co.*, 91 Ala. 392. In this relationship the carrier is consequently subject to the ordinary rules of agency. Where there was no fraud by the carrier, but by the consignor, a recovery was allowed because the money was still in the carrier's hands. *Herrick* v. *Gallagher*, 60 Barb. (N. Y.) 566. Although in deciding that where the carrier is fraudulent, he is personally liable, the principal case goes a step forward, it seems to be entirely in accord with recognized principles of agency. *Martin* v. *Morgan*, 3 Moore 635; *Snowdon* v. *Davis*, 1 Taunt. 359.

BANKRUPTCY — ACT OF BANKRUPTCY — PROCURING APPOINTMENT OF RECEIVER. — *Held*, that obtaining the appointment of a receiver in a state court by an insolvent partnership is not an act of bankruptcy. *Re Burrell, Ex parte Varick Bank*,

28 N. Y. L. J. 1381 (Dist. Ct., S. D. N. Y.) For a discussion of the principles involved, see 14 HARV. L. REV. 69.

The recent amendment to the Bankruptcy Act has fortunately changed the law on this point.

BANKRUPTCY — CONDITIONAL SALE — RIGHTS OF VENDOR AGAINST THE TRUSTEE. — The defendant had sold chattels on condition that he should retain title till payment. The contract was not recorded. A statute (Comp. St. c. 32, § 14) provides that every chattel mortgage not accompanied by delivery or recorded shall be void as against the creditors of the mortgagor. The vendee without making payment filed a voluntary petition in bankruptcy, and the vendor then replevied the goods. *Held*, that the trustee in bankruptcy can recover them. *Logan* v. *Nebraska Moline Plow Co.*, 92 N. W. Rep. 129 (Neb.).

A conditional sale in effect constitutes the seller a mortgagee, and the trustee in bankruptcy will ordinarily take subject to the mortgage. *Ex parte Fitz, Re Rawson*, 2 Lowell 519. The Nebraska statute, however, is held to make such a mortgage voidable as against any creditor of the mortgagor, using a process of court to collect his claim. See *Bank* v. *Anthony*, 39 Neb. 343. A trustee in bankruptcy, engaged in a legal process as the representative of all the creditors, seems to come within this rule, just as he stands in the position of a judgment creditor, and not of the bankrupt, in setting aside a fraudulent conveyance. See *Southard* v. *Benner*, 72 N. Y. 424. The National Bankruptcy Act, § 67 *a*, provides that "claims which for want of record are not valid against creditors, shall not be valid against the bankrupt estate." This would seem to apply expressly to the principal case. The holding is supported by a decision of the Circuit Court of Appeals. *In re Pekin Plow Co.*, 112 Fed. Rep. 308; *contra*, *In re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514.

BANKRUPTCY — LIENS — JUDGMENT WITHIN FOUR MONTHS. — The plaintiff brought a judgment creditor's action to have certain conveyances set aside as fraudulent, and thus obtained an equitable lien more than four months before defendant's bankruptcy. Judgment in this action was recovered less than four months before bankruptcy. *Held*, that the judgment is not invalidated. *Metcalf Bros. & Co.* v. *Barker*, 23 Sup. Ct. Rep. 67.

In this case the United States Supreme Court has passed for the first time on a question about which the lower federal courts have been in conflict. It regarded the creditor's bill as creating under the state law a lien before judgment, though it was one subject to be defeated by a possible event of the suit. The Bankruptcy Act, § 67 *f*, provides that "all levies, judgments, attachments, or other liens, obtained . . . within four months . . . shall be deemed null and void," but the court held that the general purpose of this section is only to invalidate liens; and therefore only judgments which create liens are affected by it. This view finds support in the fact that § 63 *a* and § 17 refer to certain other judgments not invalidated by § 67 *f*. The position of the clause in question, under the general head of liens, is strong evidence that the view taken is correct. It has been so held by a majority of previously decided cases. *In re Blair*, 108 Fed. Rep. 524; *In re Beaver Coal Co.*, 113 Fed. Rep. 889; *contra*, *In re Lesser*, 109 Fed. Rep. 201.

BANKRUPTCY — PREFERENCES — FOUR MONTHS' LIMITATION. — A mortgage was given in May, 1900, but not recorded until April, 1901. Creditors of the mortgagor filed a petition in bankruptcy May 9, 1901, and the adjudication followed June 10th. On June 4th the mortgage was paid from the mortgagor's assets, the debt secured being less than the value of the mortgaged property. *Held*, that the payment was recoverable as a preference. *Babbitt* v. *Kelly*, 70 S. W. Rep. 384 (Mo., Ct. App.).

The money here paid would not be a preference unless the mortgage was voidable. See § 60 *a* of the Act. It is provided, § 3 *b*, that a transfer open to record may be treated as an act of bankruptcy within four months from the day it is recorded. This has been construed as determining that such a transfer may be avoided as a preference if it is recorded within four months of the bankruptcy. *In re Klingaman*, 101 Fed. Rep. 691. But in the clauses treating of recoverable preferences no such provision appears. By § 60 *a* it is provided, "a person shall be deemed to have given a preference if . . . he has . . . made a transfer," etc. When a mortgage is signed and delivered it is a good transfer between the parties without record, although it may later be defeated by others. The four months, therefore, should begin to run from that date. The weight of authority so holds. *In re Wright*, 96 Fed. Rep. 187; *Asbury Park Assn.* v. *Sheperd*, 50 Atl. Rep. 65 (N. J., Ch.). When there are creditors who could have avoided the mortgage, the assignee under § 70 *e* could probably, by asserting

their rights, recover the money as a preference. The recent amendment to the Act, changing § 67 *a*, provides that the date of record determines the time when the preference is given.

BANKRUPTCY — PREFERENCES — TRANSFER FOR PRESENT AND PAST CONSIDERATION. — An insolvent debtor, with intent to give a preference, transferred his business to a creditor in consideration of a past debt of $400 and cash payment of $600. The creditor knew facts which should have put him on inquiry, which would have revealed the fraud. *Held*, that the assignee in bankruptcy can recover the business or its full value, $1000. *Johnson* v. *Cohn*, 39 N. Y. Misc. 189. For a discussion of the principles involved, see 13 HARV. L. REV. 409.

BILLS AND NOTES — FRAUDULENT CONSIDERATION — RENEWAL AS WAIVER OF DEFENSE. — A payee obtained a note by fraud. Subsequently, and with knowledge of the fraud, the maker signed a renewal note at the request of the payee. *Held*, that the maker may plead the fraud as a defense to the renewal note. *Adams* v. *Ashman*, 53 Atl. Rep. 375 (Pa.).

Fraudulent consideration renders voidable a note not in the hands of a holder in due course. *Lewis* v. *Cosgrave*, 2 Taunt. 2. But where the maker retains a benefit under the contract and elects not to repudiate it, he cannot plead the fraud to an action on the note. *Archer* v. *Bamford*, 3 Stark. 175. Where a note is void, as by a usury statute, the renewal is no better than the original. *Chapman* v. *Black*, 2 B. & A. 588. This would seem to follow as to a voidable note, unless signing the renewal is a waiver of the defense. In the principal case it did not appear that the maker retained any benefit under the contract, and the renewal was at the request of the payee. A court might well refuse under these circumstances to declare this an election not to repudiate. The maker may have sought merely to postpone an action at a time when it was important to keep his credit unimpaired. Where the original consideration was illegal the same decision has been reached as in the principal case. *Holden* v. *Cosgrove*, 12 Gray (Mass.) 216.

BILLS AND NOTES — PRESENTMENT OF CHECKS — CLEARING HOUSE. — A payee received a check on a local bank after banking hours, and, on the following day, deposited it with his own banking firm for collection through the clearing house. Before the next succeeding business day and the presentment of the check for payment, the drawee became totally insolvent. *Held*, that the failure to present on the day following the receipt releases the drawer from liability. *Edmisten* v. *Herpolsheimer*, 92 N. W. Rep. 138 (Neb.).

In general, a check must be presented for payment within a reasonable time after its receipt, or the drawer is discharged from liability on it to the extent of the loss caused by the delay in presentment. *Smith* v. *Janes*, 20 Wend. (N. Y.) 192. It has been commonly held that a reasonable time ends with the close of the business day next following the day of receipt; and within that time the check should be presented, if drawn on a local bank, or mailed for collection, if drawn on a distant bank. *Rickford* v. *Ridge*, 2 Camp. 537; *Smith* v. *Janes*, *supra*. But these cases were decided without reference to collection through a clearing house, now an established practice in every large commercial centre. This necessarily delays presentment one day; and since business usage ought to be decisive in fixing a reasonable time, the old interpretation should be relaxed. *Loux* v. *Fox*, 171 Pa. St. 68; *cf. contra*, *Holmes* v. *Roe*, 62 Mich. 199. The Negotiable Instruments Law, §§ 186, 193, provides for a reasonable time with regard to the usage of the business, which would seem to allow such an extension of time.

CARRIERS — RIGHT OF PUBLIC SERVICE COMPANIES TO WITHDRAW FROM BUSINESS. — The defendant company had for many years supplied the city of Indianapolis with natural gas. It held a franchise from the city, under which it had exercised the right to lay its mains in the streets. The company gave notice that upon a certain date it would cease to supply gas and would abandon its use of the streets. The city sought an injunction to prevent such action. *Held*, that a temporary injunction will issue, pending a final hearing. *City of Indianapolis* v. *Indianapolis Gas Co.* 35 Chicago Leg. News, 165 (Hamilton Circ. Ct, Ind.). See NOTES, p. 363.

CARRIERS — SLEEPING-CAR COMPANIES — LIABILITY FOR LOSS OF PASSENGER'S LUGGAGE. — *Held*, that a sleeping-car company is liable for the loss of a passenger's property only when the loss was due to the negligence or theft of its employees. *Pullman, etc., Co.* v. *Hatch*, 70 S. W. Rep. 771 (Tex., Civ. App.). See NOTES, p. 367.

CONFLICT OF LAWS — SIMULTANEOUS CONFLICTING JUDGMENTS IN STATE AND FEDERAL COURTS — CLAIM AGAINST FEDERAL RECEIVER. — A decree of a federal court in a petition by the bondholders of a railroad for a receivership, placed certain tort claims in a preferential class, provided they should be established as valid demands. The plaintiff had already begun in a state court an action on such a claim. She also filed the same claim, by intervention, in the federal court. Judgments were given on the same day, against the plaintiff in the federal court, and in her favor in the state court. She then filed a second petition for intervention, asking priority for the claim thus established in the state court. *Held*, that her petition will not be granted. *Goodwin* v. *Atcheson, etc., R. R. Co.*, 118 Fed. Rep. 403 (C. C. A., Eighth Circ.).

Where two conflicting valid judgments are rendered on the same cause of action, by different courts of concurrent jurisdiction, with no common court of appeal, and neither judgment can be shown to have preceded the other, a problem arises, which seems incapable of solution. One party has a legal right to which the other has an equally valid bar. The difficulty results from our system of state and federal courts, and that system provides no solution. The common law apparently furnishes no analogies, and no case in point has been found. The decision in the principal case, however, seems sound, for the decree of priority is merely a direction to the receiver, and vests no absolute rights in a claimant, even when he has proved his claim. See *Louisville, etc., R. R. Co.* v. *Wilson*, 138 U. S. 501, 506. When a court may refuse priority to any claim, this power may well be exercised against a claim which that court itself has found invalid.

CONSTITUTIONAL LAW — EMINENT DOMAIN — DAMAGE TO NON-ABUTTING LAND. — A statute provides that a railroad company shall pay all damages occasioned by laying out its road. Pub. St. Mass., c. 112, § 95. A railroad company in changing the grade of a street at a point not adjacent to the plaintiff's land, which was situated on a *cul-de-sac*, rendered the latter's premises inaccessible to teams for a period of several months. *Held*, that the plaintiff can recover the damages thereby sustained. *Putnam* v. *Boston & P. R. R. Corp.*, 65 N. E. Rep. 790 (Mass.).

Under such statutory or constitutional provisions, if a public highway is vacated or altered to the detriment of the abutting land, the owner thereof suffers special and peculiar damage for which he can recover. *Parker* v. *B. & M. R. R. Co*, 3 Cush. (Mass.) 107; see *Caledonian R. R. Co.* v. *Walker's Trustees*, L. R. 7 App. Cas. 259. When, however, such a change materially diminishes the value of non-abutting land in the vicinity by rendering access thereto more difficult, Massachusetts and a number of other jurisdictions deny the right to recover damages. *Davis* v. *Co. Com'rs*, 153 Mass. 218; *Rude* v. *St. Louis*, 93 Mo. 408. *Contra*, *Rigney* v. *Chicago*, 102 Ill. 64. The main argument advanced in support of the Massachusetts rule is that the inconvenience to owners of non-abutting land in the vicinity is the same in kind, though not in degree, as that experienced by the general public. See *Smith* v. *Boston*, 7 Cush. (Mass.) 254. This position seems untenable; for such an owner sustains in addition the loss due to the depreciation in the value of his land. Even according to the Massachusetts test, however, the principal case, which is one of first impression in that jurisdiction, seems rightly decided. The damage suffered by the plaintiff was "special and peculiar," and hence actionable, since access to his land via the public street was entirely prevented. *Brakken* v. *Minn., etc., R. R. Co.*, 29 Minn. 41; see also *Smith* v. *Boston*, *supra*, 257; *Davis* v. *Co. Com'rs*, *supra*, 223.

CONTRACTS — ERRONEOUS OFFER — LIABILITY OF TELEGRAPH COMPANY. — By an error due to the negligent transmission of a telegraph message the plaintiff was represented as offering oranges at a rate considerably below the market price. The addressee, though believing the message was erroneous, ordered two carloads. The plaintiff supposing his offer had been properly communicated sent the oranges to the addressee. The latter refused to pay a higher price than that stated in the telegram. *Held*, that the plaintiff cannot recover from the telegraph company the difference between the market price and that stated in the telegram. *Germain Fruit Co.* v. *Western Union Tel. Co*, 70 Pac. Rep. 658 (Cal.).

Had the addressee without suspecting any error accepted the offer as conveyed to him, such acceptance would, according to the better view, have rendered the plaintiff liable to supply the oranges at the rate stated in the telegram. *Ayer* v. *Western Union Tel. Co.*, 79 Me. 493; *contra*, *Pepper* v. *Tel. Co.*, 87 Tenn. 554. In such a case the telegraph company would clearly be liable to the plaintiff for the loss suffered. *Ayer* v. *Western Union Tel. Co.*, *supra*; *The Western Union Tel. Co.* v. *Shotter*, 71 Ga. 760. In the principal case, however, since the addressee believed the price quoted was due to error, there was in fact no offer for a contract; and hence no contract was completed by what

purported to be the addressee's acceptance. Consequently the latter was, as the court states, liable for the full value of the oranges ordered by him in bad faith. See *Ayer* v. *Western Union Tel. Co.*, *supra*, 499. If the plaintiff failed to collect the full amount from him, this was due not to any negligence of the defendant but to the independent wrong of the fraudulent addressee. As, therefore, no damage resulted to the plaintiff from the defendant's negligence, the decision appears sound.

CONTRACTS — RIGHTS OF BENEFICIARY — SUIT BY MATERIALMEN ON CONTRACTOR'S BOND TO CITY. — A surety company had given a bond to a city, conditioned on the full performance of a contract by which a contractor agreed to do certain work for the city, and to pay his laborers and materialmen in full. *Held*, that unpaid materialmen are beneficiaries and proper parties to a suit on the bond. *Town of Gastonia* v. *McEntee-Peterson Co.*, 42 S. E. Rep. 858 (N. C.).

In an action by the contractor, on a contract similar to the above, the city had failed to set up the non-payment by the contractor of claims of materialmen. *Held*, that the latter are not beneficiaries, and are barred from suit in the name of the city against the sureties on the contractor's bond. *City of Lancaster* v. *Frescoln*, 53 Atl. Rep. 503 (Pa.).

The right of a third party to sue upon a contract, when it is clearly made for his benefit, is recognized in both jurisdictions. *Gorrell* v. *Water Supply Co.*, 124 N. C. 328; *Merriman* v. *Moore*, 90 Pa. St. 78. The right of the materialmen to sue would seem therefore to be, in both of the principal cases, solely dependent on whether the clause in question was in fact intended for their benefit. The city's sole motive in inserting such a clause might be to secure efficient workmanship upon its buildings. A sounder view, however, would seem to be that the city wished to protect workmen and materialmen, who are usually its own citizens. Numerous statutes, and more specific provisions in bonds of a similar nature, show that such protection is customary and contemplated. See *City of Phila.* v. *Stewart*, 195 Pa. St. 309. Accordingly what few authorities there are, exactly in point, seem to support the North Carolina decision. *Lyman* v. *City of Lincoln*, 38 Neb. 794; *King* v. *Downey*, 24 Ind. App. 262. Neither case notices the doctrine which excludes sealed contracts from the usual rule. *Harms* v. *McCormick*, 132 Ill. 104.

CORPORATIONS — DE FACTO CORPORATION — INCORPORATION ACT SUBSEQUENT TO ATTEMPT TO ORGANIZE. — An attempt was made to organize a banking corporation at a time when there was no statute authorizing it. Later the necessary statute was passed, but the bank took no steps to comply with the law, though continuing to hold itself out as incorporated. *Held*, that the bank is a *de facto* corporation. *State* v. *Stevens*, 92 N. W. Rep. 420 (S. Dak.); *Mason* v. *Stevens*, *ibid.* 424. See NOTES, p. 362.

CORPORATIONS — DUTY OF OFFICERS AND STOCKHOLDERS — SALE OF INFLUENCE. — The plaintiff made a contract with the defendants, who were stockholders in a corporation, whereby he agreed to buy part of their stock and to use his influence in the corporation for the re-election of the existing board of directors, in consideration of their promise to procure for him a position as cashier of the corporation for five years, and to repurchase the stock at a fixed price when he should cease to be cashier. After the wrongful discharge of the plaintiff, the defendants refused to buy back his stock, and the plaintiff sued on the contract. *Held*, that the contract is not void as against public policy and that the plaintiff can recover. *Bonta* v. *Gridley et al.*, 78 N. Y. Supp. 961 (App. Div. 4th Dept.). See NOTES, p. 366.

CORPORATIONS — STATUTORY LIABILITY OF STOCKHOLDERS — RIGHT TO SET-OFF CLAIM AGAINST CORPORATION. — The charter of a bank provided that stockholders should be liable for the debts of the bank, to the amount of their shares. In an action by a creditor of the bank the defendant, a stockholder, pleaded by way of set-off a claim against the bank. *Held*, that he may set this off. *Strauss* v. *Denny*, 53 Atl. Rep. (Md.) 571. See NOTES, p. 364.

CORPORATIONS — STATUTORY REGISTRATION BY FOREIGN CORPORATION — RECOVERY ON CONTRACT MADE BEFORE REGISTRATION. — A Pennsylvania statute makes it unlawful for a foreign corporation to do business in the state before registering, and imposes a money penalty for doing so. The plaintiff, a New Jersey corporation, not having registered, built an electric railway for the defendant. It later registered and sued on a *quantum meruit*. *Held*, that the plaintiff cannot recover. *Delaware River, etc., Co.* v. *Bethlehem, etc., Ry. Co.*, 53 Atl. Rep. 533 (Pa.).

Under similar statutes in some jurisdictions the corporation may have its contracts enforced without registering at all, on the ground that the legislature intended to make the money penalty imposed exclusive of other penalties. *Union, etc., Ins. Co.* v. *McMillen*, 24 Oh. St. 67; *Dearborn Foundry Co.* v. *Augustine*, 5 Wash. 67. The better view, however, supported by the majority of courts, is that it cannot. *Dudley* v. *Collier*, 87 Ala. 431; *Cincinnati, etc., Co.* v. *Rosenthal*, 55 Ill. 85. The ground of the Illinois decision is that the legislature intended, as a means of preventing the prohibited act, that the plaintiff should have no standing in court to enforce a contract arising from it. This construction, however, seems strained in view of the money penalty imposed. See MOR. PRI. CORP. § 665; TAYLOR, CORP. § 401. But the Alabama and Pennsylvania cases go on the broader and more tenable ground that the court will not aid a plaintiff who, to prove his case, must allege his own illegal act. This principle seems especially applicable here, where the creation of the obligation is the illegal act. Obviously, according to neither line of reasoning, can the subsequent compliance with the provisions of the statute help the plaintiff's case. *Association* v. *Berlin*, 15 Pa. Super. Ct. 400.

CRIMINAL LAW — HOMICIDE — SIMULTANEOUS MORTAL WOUNDS. — In a trial for homicide the court instructed that if the jury found that the defendant had inflicted mortal wounds on the deceased, they must convict, although other mortal wounds were inflicted by a person acting independently. *Held*, that the instruction is erroneous. *Walker* v. *State*, 42 S. E. Rep. 787 (Ga.).

A death may result from the joint contribution of wounds inflicted by separate parties. When this is the case, either may be responsible for the death if he is proved to have had the requisite intent. See *People* v. *Lewis*, 124 Cal. 551. But it is also possible that even after the infliction of a mortal wound, causal connection may be broken by the intervention of an independent agent, who will become solely responsible for the death. *State* v. *Scates*, 5 Jones (N. C.) 420. The principal case is the only instance found where the question of causal connection was presented when wounds had been inflicted simultaneously by assailants not in concert. It is entirely possible that the mortal wound inflicted by the accused would have proved fatal only after an interval, while the wound inflicted by the other person killed instantaneously. In this event the latter person should be considered solely responsible for the death, and the accused could not properly be convicted of homicide. In overlooking this possibility the instructions were erroneous.

EQUITY — INJUNCTION — RIGHT TO PROTECTION FROM THE SEA BY NATURAL BARRIER. — The defendant was removing sand from his land in the natural use thereof. With the natural barrier destroyed, the sea would wash away the land of an intervening owner, and then that of the plaintiff. The plaintiff applied for an injunction on the ground that the defendant would cause him irreparable injury. *Held*, that the injunction will lie. *Murray* v. *Pannaci*, 53 Atl. Rep. 595 (N. J., Ch.).

The decision is placed on the ground that if the defendant brought the sea onto his land he would be liable for damages caused by its escape onto the land of the plaintiff. This seems an unwarranted application of the doctrine of *Fletcher* v. *Rylands*, although it finds some support. *Mears* v. *Dole*, 135 Mass. 508. But it is an established principle that there is a right to protection from the sea by natural barriers. Where the plaintiff's land adjoins that of the defendant, an injunction will lie to prevent the removal of the shingle, when that would result in injury to the plaintiff. *Attorney-General* v. *Tomline*, L. R. 14 Ch. D. 58. In the analogous case of lateral support, it is held that the existence of an intermediate strip of land is immaterial, if the land of the defendant is in the zone of support. *Birmingham* v. *Allen*, L. R. 6 Ch. D. 284; *Keating* v. *Cincinnati*, 38 Oh. St. 141. There seems to be no reason why the right to protection from the sea should not be extended in a similar manner, thus affording a logical basis for the desirable result of the principal case.

EQUITY — INJUNCTION AGAINST SEPARATE SUITS. — The plaintiff applied for an injunction against twenty-one persons owning land adjoining the plaintiff's sulphur works, to prevent them from bringing separate suits for injuries to their several parcels of land, caused by fumes from the plaintiff's plant. *Held*, that no such community of interest exists among the defendants as will authorize an injunction. *Ducktown Sulphur, etc., Co.* v. *Fain*, 70 S. W. Rep. 813 (Tenn.). For a discussion of the principles involved, see 14 HARV. L. REV. 611.

EQUITY — PURCHASE FOR VALUE WITHOUT NOTICE — ASSIGNMENT OF JUDGMENT THROUGH FRAUD. — The plaintiff, the obligee of a judgment, was fraudulently induced to assign the same. His fraudulent assignee in turn assigned to the defend-

ant, who gave value, without notice of the plaintiff's equities. On discovery of the fraud the plaintiff filed a bill to have both assignments set aside. *Held*, that the defendant took free from the equities of the plaintiff. *Luecht* v. *Pearson*, 65 N. E. Rep. 363 (Ill., Sup. Ct.). This decision reverses the holding of the lower court, for a discussion of which see 16 HARV. L. REV. 66.

EVIDENCE — TESTIMONY AT FORMER TRIAL — WITNESS ABSENT FROM JURISDICTION. — *Held*, that the official stenographic report of the testimony of a witness at a former trial of the same action is admissible in evidence, where the witness is permanently absent from the jurisdiction, although no effort has been made to find him. *McGovern* v. *Smith*, 53 Atl. Rep. 326 (Vt.).

It is a generally recognized exception to the rule against hearsay that evidence given at a former trial of the same action may, under certain circumstances, be admitted. In England it seems that the witness must be dead, insane, or kept away by the procurement of the opposite party. See *Regina* v. *Scaife*, 17 Q. B. 238. In America the courts are generally more lenient, but the decisions are conflicting. Inability to find the witness has been held enough. *Thompson* v. *State*, 106 Ala. 67; *contra*, *Crary* v. *Sprague*, 12 Wend. (N. Y.) 45. The same is true of illness of the witness. *Howard* v. *Patrick*, 38 Mich. 799; *contra*, *Commonwealth* v. *McKenna*, 158 Mass. 207. The evidence is also admitted by the weight of authority in circumstances like those of the principal case. *Giberson* v. *Mills Co.*, 187 Pa. St. 513; *contra*, *Berney* v. *Mitchell*, 34 N. J. Law 341. This rule seems reasonable, for such evidence is more practicable than its alternative, a deposition, is less expensive, and, in general, serves the ends of justice quite as well. The witness has testified in open court, subject to cross-examination, and the correctness of the record is undoubted. In criminal cases it may be held that the accused is denied his constitutional right of facing the witnesses against him. *Finn* v. *Commonwealth*, 5 Rand. (Va.) 708; *contra*, *People* v. *Devine*, 46 Cal. 45. But this objection can, of course, have no force in civil suits.

FRAUDULENT CONVEYANCES — RIGHTS OF EXECUTION PURCHASER — STATUTE OF LIMITATION. — The plaintiff bought at an execution sale land which had been conveyed in fraud of creditors and levied on to satisfy a judgment against the fraudulent grantor. After the lapse of the statutory period for setting aside fraudulent conveyances, but before the time necessary to acquire title by adverse possession had run, the plaintiff brought ejectment against the defendant, who had bought the land from the fraudulent grantee, with knowledge of the fraud. *Held*, that the plaintiff's right is barred by lapse of time, since he acquired a mere equity to have the fraudulent conveyance set aside. *Brasie* v. *Minneapolis Brewing Co.*, 92 N. W. Rep. 340 (Minn.).

Property conveyed in fraud of creditors may be seized in the hands of the fraudulent grantee, as though no conveyance had been made, and sold on execution as the property of the grantor. *Thomason* v. *Neeley*, 50 Miss. 310; *Owen* v. *Dixon*, 17 Conn. 492. The execution purchaser may succeed in ejectment against the fraudulent grantee, provided he can show on the trial that the grantee's conveyance was fraudulent. *Mulford* v. *Peterson*, 35 N. J. Law 127, 132. It follows that the execution purchaser has a perfect legal title, subject to the burden of proving the conveyance fraudulent, if the grantee asserts its validity. *Thompson* v. *Barker*, 141 U. S. 648, 655; see FREEMAN, EXECUTIONS, § 136. The decision of the Minnesota court is contrary to authority, and incompatible with well settled views as to the nature of the rights at law to fraudulently conveyed property. It leads to this incongruity: an execution purchaser may succeed in ejectment, if he brings his action within the statutory period, as the Minnesota court admits, although at the time he comes into court it is asserted that he has a mere equity to have the title of the fraudulent grantee set aside.

INSURANCE — CONSTRUCTIVE TOTAL LOSS — MARINE POLICIES FREE OF PARTICULAR AVERAGE. — By a policy of marine insurance a cargo of fruit and vegetables shipped by canal boat was warranted free of particular average. The canal boat was sunk; and there was a constructive total loss. *Held*, that the insured may recover on the policy. *Devitt* v. *Providence, etc., Ins. Co.*, 173 N. Y. 17.

When a cargo is warranted free of particular average, the insurer is not liable for less than a total loss. See ARNOULD, MARINE INS., 7th ed. § 884. This, however, in marine insurance may be either absolute or constructive. *Roux* v. *Salvador*, 3 Bing. N. C. 286. But there is a conflict whether a constructive total loss is insured against when there is a warranty free of particular average, especially when as in the principal case the warranty is applied to "memorandum" or perishable articles. In England, in all cases, a constructive total loss is as much within an insurance policy as an abso-

lute total loss. *Adams* v. *McKenzie*, 13 C. B. N. S. 422; *Suiling Ship Blaimore Co.* v. *MacKredie*, [1898] A. C. 593. In the United States, however, the law is in confusion. A few decisions are in accord with the entire English doctrine. *Poole* v. *Protection Ins. Co.*, 14 Conn. 47. Other courts agree in part, but have not decided whether the doctrine applies when the insurance is on memorandum articles. *Mayo* v. *India Mut. Ins. Co.*, 152 Mass. 172. In the United States Supreme Court, in the case of non-perishable goods there must be either a total loss of value or an absolute total loss. *Ins. Co.* v. *Fogarty*, 19 Wall. 640. But insurance on memorandum articles cannot be recovered if the articles continue to exist in specie. *Washburn, etc., Co.* v. *Reliance Marine Ins. Co*, 179 U. S. 1. The decision in the principal case, bringing New York squarely into line with England, marks the tendency toward relaxing the law in favor of the insured. *Cf. Cocking* v. *Fraser*, 4 Doug. 295; *McGrath* v. *Church*, 1 Cai. Cas. 195; *Chadsey* v. *Guion*, 97 N. Y. 333.

INSURANCE — POLICY ON PROPERTY FRAUDULENTLY CONVEYED — RECOVERY BY GRANTEE. — Creditors had procured a decree that a certain conveyance was fraudulent. The property was later damaged by fire, and the creditors sued the grantee and the insurance company for the proceeds of a policy taken out by the grantee. *Held*, that the proceeds of the policy go to the grantee. *Steinmeyer* v. *Steinmeyer*, 42 S. E. Rep. 184 (S. C.). See NOTES, p. 361.

INTERNATIONAL LAW — EXTRADITION — SUBSEQUENT ANNEXATION OF LOCUS DELICTI BY DEMANDING STATE. — The prisoner committed a crime at Johannesburg before 1900, the date of the annexation of the South African Republic by Great Britain. Under the treaty of 1889 between the United States and Great Britain, the latter state subsequently asked for his extradition. Upon arrest the prisoner brought *habeas corpus* proceedings. *Held*, that since Johannesburg was not within the jurisdiction of Great Britain at the time of the offense, the prisoner must be discharged. *In re Taylor*, 118 Fed. 196 (Dist. Ct., Mass.).

Demands for extradition should generally be considered in the light of the conditions existing at the time the demands are made rather than at the time the crime was committed. See 2 CALVO, DROIT INTERNAT. § 1064; 2 CLUNET, 461, *Suisse Tribunal fédéral*, 25 juin 1875. Nor is the principle that penal law shall not be retroactive infringed by this, for extradition is neither a punishment nor an act of criminal procedure. 7 CLUNET, 406, *Suisse Tribunal fédéral*, 22 mars 1879: *In re De Giacomo*, 12 Blatch. (U. S. Circ. Ct.) 391. Consequently it has been held that extradition will be granted for a crime committed before the existence of the treaty under which it is asked *In re De Giacomo, supra.* That an annexing state may punish a crime committed against the laws of the absorbed state is clear. See *Damon's Case*, 6 Me. 148. There would seem then to be no distinction between the principal case and *In re De Giacomo, supra.* In each case the demanding state alleges an extraditable offense, which it can punish, committed in territory to which a treaty now extends. The decision in the principal case is difficult to support.

MUNICIPAL CORPORATIONS — LIABILITY TO SPECIAL TAX-PAYERS FOR COMPLETION OF LOCAL IMPROVEMENTS. — A city released a paving contractor and his solvent surety, and relet the contract at increased cost. Abutting owners, assessed for the cost under the first contract, and then for the increase, sued the city to recover this second amount. *Held*, that the city is liable therefor. *Louisville* v. *Kentucky, etc., Co.*, 70 S. W. Rep. 627 (Ky.). See NOTES, p. 360.

PROPERTY — ADMINISTRATION — SET-OFF OF DEBT BARRED BY STATUTE OF LIMITATIONS. — An heir owed an estate a debt the recovery of which was barred by the Statute of Limitations. *Held*, that the administrator can retain the amount of the debt from the distributive share of the heir. *Holden* v. *Spier*, 70 Pac. Rep. 348 (Kan.). For a discussion of the principles involved, see 14 HARV. L. REV. 73.

PROPERTY — ADVERSE POSSESSION — TACKING. — In ejectment the plaintiff claimed through his own adverse possession and that of his predecessors, A, B, C and D. The only privity between A and B arose from an invalid sheriff's sale and transfer. *Held*, that such privity is not enough to justify tacking the adverse possessions. *Johnston* v. *Case*, 42 S. E. Rep. 957 (N. C.). For a discussion of the principles involved, see 13 HARV. L. REV. 52; 14 *ibid.* 72.

PROPERTY — APPOINTMENT UNDER GENERAL POWER — TITLE IN EXECUTORS AS SUCH. — By the Finance Act of 1894, § 9, (1), estate duty on property which passes to the executor as such is payable out of the residue, whereas estate duty on property not

passing to the executor as such is a first charge on the specific property. X, having a general power of appointment over personal property, exercised it by will. *Held*, that it passes to the executor as such, and the duty is payable out of the residue. *Re Fearnside's Estate*, [1903] 1 Ch. 250.

Where personal property is appointed by will under a general power and executors are named, the property passes to the executors of the will. *Re Philbrick's Settlement*, 34 L. J. Ch. 368; *Re Hoskin's Trusts*, 6 Ch. D. 281. It is an open question, however, in what character the executors take. In three cases it has been held that the executors take as trustees for the appointee. *In re Treasure*, [1900] 2 Ch. 648; *In re Maddock*, [1901] 2 Ch. 372; *In re Power*, [1901] 2 Ch. 659. On the other hand, it has been held in two cases that the executors take as such. *In re Moore*, [1901] 1 Ch. 691; *In re Dixon*, [1902] 1 Ch. 248. The principal case reaches the same result as the latter cases by reference to other sections of the Finance Act of 1894. It is submitted that the result reached is correct. When the executor has received the property appointed under a general power he must, if necessary, use it as assets for payment of the testator's debts, before turning over the residue, if any, to the appointees. *Townshend* v. *Windham*, 2 Ves. Sen. 1; *Clapp* v. *Ingraham*, 126 Mass. 200. Since it is only as executor that he is bound to pay testator's debts, the settled rule represented by those cases tends to sustain the principal case.

PROPERTY — CONTINGENT REMAINDERS — ATTACHMENT IN EQUITY. — *Held*, that equity will not order the sale of a debtor's contingent remainder at the suit of a creditor. *Howbert* v. *Cawthorn*, 42 S. E. Rep. 683 (Va.).

Contingent remainders were originally inalienable at law, except by estoppel, though assignable in equity. Accordingly, courts of equity, being reluctant to offer the purchaser merely a possible right to specific performance, refused to order the sale of a debtor's contingent remainder. *Watson* v. *Dodd*, 68 N. C. 528. This does not seem a necessary conclusion, for a contingent remainder already had been held to pass to an assignee in bankruptcy. *Higden* v. *Williamson*, 3 P. Wms. 132. This is the better rule to-day. *Whelen* v. *Phillips*, 151 Pa. St. 312; *contra*, *Re Wetmore*, 108 Fed. Rep. 520. By statutes almost everywhere in force contingent remainders are now transferable by deed. Therefore equity will compel specific performance of a contract for their sale. *Matter of Asch*, 75 N. Y. App. Div. 486. It would seem that any property of a debtor, certainly any transferable at law, should be subject to the payment of his debts, and the decision in the principal case seems therefore unfortunate. See *Daniels* v. *Eldredge*, 125 Mass. 356; but see *contra*, 68 Va. L. Reg. 573. There appears to be little authority on the point.

PROPERTY — LANDLORD AND TENANT — IMPLIED COVENANT FOR QUIET ENJOYMENT. — The defendant held premises under a lease containing a covenant not to use them for trade purposes. He sublet to the plaintiff, who was unaware of the restrictive covenant in the defendant's lease. The plaintiff proceeded to use the premises for trade purposes, but was enjoined from doing so at the instance of the defendant's lessor. *Held*, that the defendant's implied covenant for quiet enjoyment has not been broken. *Jones* v. *Lavington*, 19 T. L. R. 77 (Eng., C. A.).

It is well settled that a covenant for quiet enjoyment is implied from the ordinary words of leasing. *Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351; *Dexter* v. *Manley*, 4 Cush. (Mass.) 14. The scope of this covenant, however, has not been clearly defined. No doubt the covenant, whether express or implied, is broken when the enjoyment of the premises is substantially interfered with by the lessor or those claiming under him. See *Robinson* v. *Kilvert*, L. R. 41 Ch. D. 88, 96; *Sanderson* v. *Mayor, etc.*, L. R. 13 Q. B. D. 547. But when the interference is by one having a title paramount to that of the lessor, the tendency of the English courts is to hold that an implied covenant is not broken. Thus there is no breach of such a covenant if, upon the termination of the lessor's estate, the lessee be evicted by the remainderman. *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610; see 9 HARV. L. REV. 434. Moreover, even an express covenant is not broken when the lessor's title is encumbered with restrictions upon the user of the premises, and these restrictions are enforced against the lessee. *Dennett* v. *Atherton*, L. R. 7 Q. B. 316. The principal case would seem to be a consistent application of the English law as settled by these decisions. On principle, however, this doctrine seems too harsh; and probably the implied covenantee would be more fully protected in America. *Cf. Hamilton* v. *Wright's Admr.*, 28 Mo. 199; *Duncklee* v. *Webber*, 151 Mass. 408; *Kane* v. *Mink*, 64 Ia. 84.

PROPERTY — RIGHT OF LATERAL SUPPORT — NOTICE OF EXCAVATION NEAR BOUNDARY — An owner excavated near the building of the plaintiff, who knew of the proposed excavation. *Held*, that the failure of the defendant owner to give notice of

the extent of the excavation renders him liable for damages to the building. *Davis* v. *Summerfield*, 42 S. E. Rep. 818 (N. C.).

It is settled law that the owner of a building has no natural right to have it supported by the land of an adjacent owner. *Dalton* v. *Angus*, 6 App. Cas. 740. The generally recognized doctrine that an owner is entitled to proper notice of excavations on neighboring land which will endanger his buildings, apparently owes its origin to the disposition of the courts to alleviate some of the hardships incident to this rule. See *Shafer* v. *Wilson*, 44 Md. 268; *Schultz* v. *Byers*, 53 N. J. Law, 442. No decision has been found which attempts to define proper notice, but the holding of the principal case that it must include information of the extent of the excavation, is inconsistent with the assumption of some courts that if the neighbor has actual knowledge of the intention to excavate, there is no obligation to give him formal notice. See *Schultz* v. *Byers*, *supra*; *Uerick* v. *S. Dak., etc., Co.*, 2 S. Dak. 285. But the purpose of the rule is to give the neighbor an opportunity to protect his property, and since the question whether or not it is endangered depends upon the character of the excavation, it seems reasonable that he should be entitled to information of the extent as well as of the fact of the proposed change.

PROPERTY — WILLS — SURVIVORSHIP. — A will gave property to the only son of the testatrix, but "in the event of my becoming the survivor . . . of my son," then to the appellant. The mother and son perished in a common disaster, and no evidence was produced as to who survived. *Held*, that the appellant was entitled to the property. *The Young Women's Christian Home* v. *French*, 23 Sup. Ct. Rep. 184. See NOTES, p. 368.

STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR — OPTION TO TERMINATE. — It was orally agreed that the plaintiff should work for the defendant for two years, but might terminate the contract in six months. *Held*, that the contract is void under the Statute of Frauds. *Biest* v. *Ver Steeg Shoe Co.*, 70 S. W. Rep. 1081 (Mo., Sup. Ct.).

A parol contract of personal service for life is not void, though the parties may in fact contemplate a performance lasting longer than a year. *Souch* v. *Strawbridge*, 2 C. B. 808. But a parol contract to serve for a definite period of more than one year is invalid. *Freeman* v. *Foss*, 145 Mass. 361. The parties having expressed their intention, the contract may be rendered impossible, but will not be performed by death. The English and some American courts apply this doctrine even where, as in the principal case, the contingent termination of the contract is provided for by its terms. *Dobson* v. *Collis*, 1 H. & N. 81; *Meyer* v. *Roberts*, 46 Ark. 80. In other jurisdictions the provision for performance during more than a year must be unqualified. *Roberts* v. *Rockbottom Co.*, 7 Met. (Mass.) 46; *Blake* v. *Voigt*, 134 N. Y. 69. It seems that the principal case might better have adopted this latter view. The express terms of the contract would be performed by the exercise of the option equally as well as by service for two years. The parties having expressed an indifferent intention as to time for performance, the contract is on the same footing as one in which they express no intention at all. Such parol agreements are universally held not within the Statute. *Peter* v. *Compton*, Skin. 353.

TORTS — CONTRIBUTORY NEGLIGENCE — LAST CHANCE DOCTRINE. — *Held*, that the plaintiff, having the last chance to avoid the accident, cannot recover. *Barnhill* v. *Texas & P. R. R. Co.*, 33 So. Rep. 63 (La.). See NOTES, p. 365.

TORTS — DECEIT — MISREPRESENTATION BROUGHT ABOUT BY DEFENDANT. — A commercial agency gave the defendant an erroneous rating based in part on false information given it by the defendant as to his financial condition. Relying on this rating, the plaintiff furnished goods to the defendant on credit. The defendant became bankrupt. *Held*, that the plaintiff can recover in an action for deceit. *Tindle* v. *Birkett*, 171 N. Y. 520, reversing the decision in 57 N. Y. App. Div. 450. For a discussion of the decision in the lower court, see 15 HARV. L. REV. 158.

TORTS — PROXIMATE CAUSE — NERVOUS SHOCK FROM TORT TO THIRD PARTY. — A conductor in the employ of the defendant company committed a tort on a child in the presence of her mother. *Held*, that as a matter of law, the mother cannot recover for permanent injury to her health resulting from nervous excitement caused by the assault on the child. *Sanderson* v. *Northern Pac. R. R. Co.*, 92 N. W. Rep. 542 (Minn.).

In Minnesota there may be recovery for physical injuries from nervous shock due to fear on the part of the plaintiff of injury to himself. *Purcell* v. *St. P. City Ry. Co.*, 48

Minn. 134. It is impossible to distinguish such cases from the present one, otherwise than by a purely arbitrary line. When it is decided that physical impact is unnecessary, the courts should recognize that in this new condition the former limitations of assault are inapplicable. Nervous shock may come from various causes. Certainly in a mother it may come as naturally from fear for her child, as for herself. It is difficult to see why the case should not have gone to the jury to determine, if under the circumstances and according to the general principles of legal cause, the injury to the mother was the probable and proximate result of the assault on the child. This would undoubtedly be a wide extension of tort liability, but unless public policy be invoked, it seems impossible to escape this result. The reasoning of one case would seem to lead to this conclusion. *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57. In accord with the principal case, however, see a *dictum* in *Dulieu* v. *White*, [1901] 2 K. B. 669, 675.

TORTS — PROXIMATE CAUSE — OWNER BURNED IN SAVING PROPERTY. — The defendant negligently started a fire, and the plaintiff, while endeavoring to save his property was severely burned without negligence on his part. *Held*, that the plaintiff cannot recover. *Logan* v. *Wabash R. R. Co.*, 70 S. W. Rep. 734 (Mo., Ct. App.).

The case refuses recovery on the ground that the plaintiff's act in attempting to save the property was an intervening cause. This reason seems hardly sound. Since the plaintiff was only making such reasonable effort to save his property and to avoid damages as the law requires, the causal connection should be held not broken. If liability is to be denied it should be on the ground that injury was not foreseeable, provided the plaintiff used due care. *Seale* v. *Gulf, etc., R. R. Co.*, 65 Tex. 274. But injuries in fighting fire are certainly not unlikely. The weight of the little authority found is that they are to be deemed foreseeable. *Liming* v. *Ill. Cent. R. R. Co.*, 81 Ia. 246; *Berg* v. *Great Northern R. R. Co.*, 70 Minn. 272, *semble*. When a wrongdoer forces another to a dangerous task, injuries are probable and recovery should be allowed if harm results. *Page* v. *Bucksport*, 64 Me. 51.

WILLS — MISTAKE — STRIKING OUT ERRONEOUS CLAUSE. — As a result of an attorney's error, the testatrix had devised only "an undivided moiety of and in" certain lands, in which she in fact had the entire interest. The draft of the will had been read by her, but it was found that this particular provision had never been noticed and approved. *Held*, that probate should be granted without the clause quoted above. *Briscoe* v. *Baillie Hamilton*, [1902] P. 234.

If a will has not been read to or by the testator, a word inserted by mistake may be struck out although a bequest is thereby increased. *Morrell* v. *Morrell*, 7 P. & D. 68. But if the will has been thus read, knowledge of its contents is conclusively presumed. *Guardhouse* v. *Blackburn*, L. R. 1 P. & D 109. The decision in the principal case following a later *dictum*, refuses probate of a disputed clause unless a jury could infer that the testatrix had confirmed it. See *Fulton* v. *Andrew*, L. R. 7 H. L. 448, 464. The decision seems especially unfortunate. The striking out of the clause inserted by mistake, increases the estate of the devisee, who thereby takes an unattested devise, in complete disregard of the express terms of the Wills Act. Moreover the instrument is not probated as formally executed by the testatrix with knowledge of its contents. To avoid any such result, the policy of the law would seem to demand that no interference with the terms of the will should be allowed except in cases of fraud. There are few American decisions on this precise point, but the tendency of the courts is against permitting any change in the instrument executed by the testator. *McAlister* v. *Butterfield*, 31 Ind. 25; MERWIN, EQ., § 490; but see *contra*, SCHOULER, WILLS, § 219.